

BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC

In the Matter of the Application of

Michael Pino

For Review of Disciplinary Action Taken by

FINRA

File No. 3-15935

**FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW**

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**FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW**

**I. INTRODUCTION**

This case involves an experienced registered representative's unyielding refusal to recognize that his admitted exercise of trading authority in a customer's account violated basic customer protection rules. The record shows that, over a more than two-year period, applicant Michael Pino repeatedly exercised trading discretion in two accounts of his customer, [REDACTED]. [REDACTED], however, never granted Pino written authority to exercise that discretion. Furthermore, Pino's employing member firms never accepted [REDACTED]'s accounts as discretionary.

Irrespective of these undisputed facts, Pino asserts that his discretionary trading was appropriate based on a general trading strategy that he purportedly discussed with [REDACTED] and that, pursuant to this strategy, [REDACTED] "pre-authorized" all of Pino's trades. Under the strategy, Pino would select stocks to purchase prior to the release of earnings reports and then seek to sell these same stocks soon thereafter if there had been an increase in price. While Pino

contends that [REDACTED]'s purported agreement to pursue this strategy gave him the authority to sell the stocks in question without the necessity for [REDACTED]'s specific approval of each trade, the law is unequivocal that Pino's trading pursuant to the strategy does not fall within any exception to the rule requiring written authorization and approval for discretionary trading.

As the National Adjudicatory Council (the "NAC") properly held, Pino repeatedly exercised improper discretion in [REDACTED]'s accounts in violation of NASD and FINRA rules. Pino made numerous purchases and sales in [REDACTED]'s accounts without written authority to exercise discretion or prior approval of the trades, and Pino's admitted conduct belies his assertion that he only exercised time and price discretion. [REDACTED] credibly testified that Pino did not discuss with him many of the trades in his accounts. Pino decided not only the time and price at which he would buy and sell stock in [REDACTED]'s accounts, but also the specific stocks and the amount of stocks to trade. Pino also admitted that he exercised this supposed time and price discretion beyond the business day on which [REDACTED] purportedly granted it in violation of the concept allowing time and price discretion. The NAC correctly rejected Pino's claim that he exercised only time and price discretion.

Consistent with the FINRA Sanction Guidelines (the "Guidelines") and the serious nature of Pino's misconduct, the NAC suspended Pino for 30 business days from association with any member firm in all capacities and fined him \$5,000. FINRA's sanctions are fully supported by the record and the Guidelines. Pino placed his interests in perpetuating a trading strategy above those of an investor who may have rejected the trades had he known about them. Pino's exercise of discretion continued for a period of more than two years, and Pino admitted that he knew his firms' policies prohibited the exercise of discretion in [REDACTED]'s accounts. His misconduct frustrated his employing firms' ability to supervise properly the accounts as discretionary.

While Pino largely admits to the facts underlying his misconduct, he attempts to blame FINRA and evade responsibility for his violations based his misreading of the applicable rules and his own unsupportable and self-serving statements. The record, however, fully supports the factual and legal bases of the NAC's findings and sanctions. Accordingly, the Commission should dismiss Pino's application for review.

## II. FACTUAL BACKGROUND

### A. Michael Pino

Pino first entered the securities industry in 1985 and was subsequently associated with a number of member firms. (RP 595-96.)<sup>1</sup> The misconduct at issue in this case occurred over a more than two-year period, from 2007 through 2009, while Pino was associated with Centennial Securities Company, LLC ("Centennial Securities") and Money Concepts Capital Corporation ("Money Concepts"). Pino was registered with Centennial Securities as a general securities representative from May 2002 to December 2008. (RP 591.) After leaving Centennial Securities, Pino was registered as a general securities representative with Money Concepts from January 2009 to August 2010. (RP 590.) Pino is not currently associated with any FINRA member firm. (RP 305-06, 590.)

### B. Pino's Trading Strategy

While associated with Centennial Securities, Pino developed an investment strategy that he called an "earnings strategy." (RP 380-83.) The purpose of the strategy was to garner profits

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<sup>1</sup> "RP" refers to the page number in the certified record. "Pino Br. \_\_" refers to Pino's August 3, 2014 submission in support of his application for review. On September 22, 2014, FINRA also received another single page document from Pino which he calls his "reply brief." However, this document cannot be Pino's reply as it was received four days before FINRA served its brief. To the extent this document is meant to supplement Pino's moving brief, it is untimely and, accordingly, the Commission should disregard it.

by capitalizing on the increase in a stock's market price immediately following the release of a positive earnings report. (*Id.*) Pino viewed the strategy as a reasonable alternative to a buy-and-hold strategy for investors who wanted greater investment returns. (RP 384, 387.)

Under the earnings strategy, Pino looked for companies whose share price he expected would increase following the release of a positive earnings report. (RP 381-82.) In order to identify these companies, Pino would look to the earnings reports and share price of certain "sector leaders." If the sector leader beat analysts' earnings forecasts and the leader's share price rose by approximately 5 to 15 percent as a result of the positive news generated by the earnings report, Pino would look for other companies in the same sector that were about to report their quarterly earnings. (RP 381-82, 393-94.) Once Pino identified a target company, his strategy was to purchase that company's stock the day before it released its earnings report and then sell it the next day or two when the stock price rapidly increased or, in Pino's words, "explode[d]." (RP 389-90.) If the stock did not react as he expected, Pino sometimes held the stock longer than a day or two to see if its price improved. (RP 390, 394-95.)

**C. Customer ██████████**

At the time he met Pino, ██████████ was 57 years old and had recently taken an early retirement package from General Motors after 38 years of employment as, among other positions, a crane operator. (RP 234.) ██████████ had a high school education and had never worked with a broker or financial advisor before he met Pino. (RP 234-36.) ██████████ had no experience with investing in securities apart from a small IRA that was part of GM's benefits package. That IRA was valued at approximately \$45,800 when he retired. (RP 235-37, 270.) ██████████ was referred to Pino by a former co-worker. (RP 235.)

In approximately December 2006, ██████████ contacted Pino, and they met soon afterwards at ██████████'s home to discuss opening an account with Pino at Centennial Securities. (RP 236.) ██████████ testified that during that conversation, Pino did not make any specific investment recommendations. (RP 240.) Rather, ██████████ and Pino generally discussed placing half of the value of the IRA in bonds and the other half in stocks. (*Id.*) ██████████ also testified that he expressly told Pino that he did not want to purchase any automotive securities because GM and Chrysler were facing bankruptcy. (RP 239.) Instead, ██████████ told Pino that he was interested in "environmental stocks" because it was "the coming thing." (RP 238-39.) ██████████ also testified that Pino did not discuss his earnings strategy during this meeting, and could not recall ever discussing the strategy with Pino at all. (RP 240, 300-01.)

At the end of the meeting, ██████████ signed the required documentation to open an IRA account at Centennial Securities. (RP 241.) ██████████ transferred the entire value of his IRA to his Centennial Securities account in January 2007. (RP 241, 270.) In January 2009, when Pino left Centennial Securities to join Money Concepts, ██████████ transferred his account to Money Concepts. (RP 590-91, 877-82). Importantly, it is undisputed that ██████████ never granted Pino written authority to exercise discretion in his Centennial Securities or his Money Concepts accounts. (RP 258-59, 398.) Moreover, neither Centennial Securities nor Money Concepts had approved ██████████'s account for discretionary trading. (RP 398, 435, 453, 498.) Centennial Securities' policies did not allow discretionary trading in non-fee based accounts like ██████████'s, and Money Concepts did not allow general securities representatives like Pino to exercise discretionary trading authority. (RP 311-12, 347, 437.) Pino testified that he was aware of both firms' policies with respect to discretionary accounts. (RP 324-27.)

**D. Pino's Trading in ██████'s Accounts**

**1. ██████'s Centennial Securities Account**

From January 2007 through October 2008, Pino made roughly 120 purchases and sales in ██████'s Centennial Securities account. (RP 467-70.) Pino began purchasing securities in the account shortly after he opened it, and testified that he began using the earnings strategy in ██████'s account in mid-March 2007. (RP 242, 387, 616.) Pino, however, did not obtain ██████'s oral authorization before each purchase and sale. (RP 245, 254-5, 299.) For example, Pino made five purchases around the end of January 2007. (RP 467, 616.) Two of the purchases included \$21,370 worth of bonds issued by General Motors Acceptance Corporation and Ford Motor Company. (*Id.*) According to ██████, Pino purchased these bonds even though he had instructed Pino that he did not want to purchase any automotive securities, and Pino did not contact him before making the purchases. (RP 242, 290-91.) ██████ stated that he was upset when he learned that Pino bought the automotive securities, and he called Pino to complain. (*Id.*) Pino, however, convinced ██████ to keep the securities. (*Id.*)

██████ testified that he only spoke with Pino about once a month over the two years during which Pino was his broker at Centennial Securities. (RP 243-44.) During their infrequent conversations, ██████ testified that he and Pino would discuss sports and general market conditions. With perhaps two exceptions, they never discussed specific stock purchases or sales. (RP 244, 255.) Dickerson testified unequivocally that he and Pino "never discussed . . . how much to buy or how much to sell, how much [Pino] was buying or how much [Pino] was going to sell of it." (RP 299.) Instead, ██████ described the trades as "just happen[ing]." (*Id.*) Despite Pino's protestations that he spoke with Dickerson more frequently and prior to every trade, the Hearing Panel found that ██████'s testimony was credible, and, in its de novo

review, the NAC found “nothing in the record that would cause [it] to disturb the Hearing Panel’s [credibility] finding.” (RP 1298.)

## 2. ██████’s Money Concepts Account

By the time Pino transferred ██████’s account to Money Concepts in January 2009, it had lost almost half its value from ██████’s initial investment with Pino and was worth \$23,254.74. (RP 252-53, 546, 609.) Again, it is undisputed that ██████ never granted Pino written authority to exercise discretion in ██████’s Money Concepts account. (RP 258-59, 398.)

At Money Concepts, Pino continued trading in the same manner as he had in ██████’s Centennial Securities account, including using the earnings strategy. (RP 392.) ██████ testified, however, that at Money Concepts, Pino began to contact him much more frequently. ██████ testified that initially he and Pino spoke every week or two, and later, spoke as much as two to three times per week. (RP 253-54.) At this point, Pino was generally contacting ██████ prior to purchasing stock, but continued to sell without speaking with him prior to the trade. (RP 256-58.) Significantly, ██████ testified that he would learn of sales either from an after-the-fact call from Pino or by reviewing his trading confirmations generated by the firm. (RP 246, 257, 354.)

Pino’s testimony largely corroborated ██████’s account of their communications at Money Concepts. Pino stated that he would obtain “authority” from ██████ for the sale of a stock at the time the purchase was discussed. (RP 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86.) Pino specifically testified that he would discuss with ██████ a target price range for the sale at the time they discussed the purchase, and that Pino viewed this as a form of time and price discretion for the sale. (RP 397.) Pino also testified that he sometimes exercised this form

of discretion because [REDACTED] would not be available to speak to him on the morning of a sale. (RP 585-86, 280-81.) Pino claimed that [REDACTED]'s unavailability on the morning of a sale did not matter because Dickerson had already given Pino authorization (the previous day) to sell the stocks at a certain price range. (RP 585-86.) Pino described these transactions as "client authorized to sell at my discretion," and estimated that he used this "discretion" for approximately 30-50% of the sales in [REDACTED]'s Money Concepts account. (RP 321.) It is undisputed, however, that these sales usually occurred the day after Pino's conversation with [REDACTED] and, in some cases, two or more days after [REDACTED] supposedly authorized the sale. (RP 320-22, 585-86.) Indeed, the record shows that there was not a single instance in which a stock was purchased and sold in the same day. (RP 609-1040.) Pino also maintained that [REDACTED]'s agreement to pursue the earnings strategy also constituted "authorization" of the trades made pursuant to it. (RP 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86.)

### III. PROCEDURAL HISTORY

On May 16, 2012, FINRA's Department of Enforcement ("Enforcement") filed a one-cause complaint alleging that Pino exercised discretion without written authorization in [REDACTED]'s accounts in violation of NASD Rules 2510(b) and 2110, and FINRA Rule 2010. (RP 6-10.) After a hearing, the Hearing Panel found Pino liable for the misconduct as alleged in the complaint. (RP 1049-62.) The Hearing Panel fined Pino \$5,000 and suspended him for 30 business days in all capacities for his violations. (RP 1062.)

Following Pino's appeal, the NAC affirmed the Hearing Panel's findings of liability and sanctions. (RP 1293-1302.) The NAC found that Pino exercised discretion in [REDACTED]'s accounts without written authorization or member-firm approval in violation of NASD Rules 2510(b) and 2110, and FINRA Rule 2010, and that the "time and price" discretion exception of

NASD Rule 2510(d)(1) did not apply to Pino's trading. (RP 1297-1300.) Specifically, the NAC found that Pino did not exercise solely time and price discretion because: (1) Pino decided which stocks to purchase and the amounts without discussing these with [REDACTED]; and (2) the sales did not occur on the same business day that [REDACTED] purportedly granted Pino time and price discretion. (RP 1297-98.) The NAC also rejected Pino's contention that [REDACTED]'s oral approval of the earnings strategy constituted authorization of the sales made pursuant to it under time and price discretion. (RP 1299-1300.) The NAC affirmed the sanctions of a \$5,000 fine and a 30-day suspension in all capacities. The NAC found that Pino's misconduct was egregious and that the sanctions were consistent with the Guidelines and appropriately remedial. (RP 1302.) This appeal followed.

#### IV. ARGUMENT

The crux of this case is a simple issue: whether Pino had authority to exercise discretion in [REDACTED]'s account. He did not. While Pino attempts to create multiple side issues, the record amply demonstrates that Pino violated the rules for discretionary trading. First, [REDACTED]'s testimony, which was credited by the Hearing Panel and the NAC, and Pino's own admissions establish that Pino exercised discretion in [REDACTED]'s account. Second, it is undisputed that [REDACTED] never gave Pino written authority to exercise discretion, and neither Centennial Securities nor Money Concepts approved [REDACTED]'s accounts in writing for discretionary trading. Indeed, the record shows that Centennial Securities did not permit any discretionary trading in the type of account [REDACTED] had, and Money Concepts only allowed registered investment advisors, which Pino was not, to have discretionary accounts. Finally, Pino's assertion that his trading came within the time and price discretion exception of Rule 2510(d)(1) fails because, based on Pino's own description of the trading, he did not exercise this

discretion on the day it was purportedly authorized by [REDACTED]. Moreover, the law is clear that even if [REDACTED] agreed to adopt Pino's earnings strategy, this oral agreement does not constitute time and price discretion.

**A. Pino Exercised Discretion in Dickerson's Accounts Without Written Authorization or Firm Approval in Violation of NASD Rules 2510(b) and 2110 and FINRA Rule 2010**

NASD Rule 2510(b) provides that no registered representative "shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization," and the discretionary account has been approved in writing by the member firm. NASD Rule 2510(d)(1) provides a limited exception to this written authorization requirement. Under Rule 2510(d)(1), written authorization is not required to exercise "discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed." The exception, however, is subject to the key time limitation "that the authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer." Accordingly, time and price discretion may only be exercised without written authorization when the trade occurs on the same business day that the customer granted the authorization. *See NASD Notice to Members 04-71*, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p011633.pdf> (Oct. 2004); *see also Dep't of Enforcement v. Griffith*, Complaint No. C01040025, 2005 NASD Discip. LEXIS 35, \*12 (NASD Hearing Panel Sept. 7, 2005) (noting that in 2005 the rule was amended to "limit time and price discretionary authority

to the end of the business day it was granted”).<sup>2</sup> Moreover, NASD Rule 2510(d)(1) only allows discretion over time and price, when a customer has approved the specific security and quantity of that security to be traded. *See, e.g., Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at \*35 (Nov. 8, 2006) (holding that time and price discretion did not apply where the registered representative and customer had not agreed on the amounts of certain purchases), *aff’d*, 304 F. App’x 883 (D.C. Cir. 2008).

NASD Rule 2110 and FINRA Rule 2010 require associated persons to conduct their business in accordance with “high standards of commercial honor and just and equitable principles of trade.”<sup>3</sup> It is well settled that a violation of another FINRA rule, including Rule 2510, is a violation of NASD Rule 2110 and FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at \*26 n. 29 (July 2, 2013), (stating that “a violation of another Commission or NASD rule or regulation . . . constitutes a violation of [NASD] Rule 2110”), *aff’d sub nom Birkelbach v. SEC*, 751 F.3d 472 (11th Cir. 2014).

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<sup>2</sup> Prior to January 31, 2005, NASD Rule 2510(d) provided that the requirements of Rule 2510 did not apply to “discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a security shall be executed.” *NASD Notice to Members 04-71*. On January 31, 2005, NASD Rule 2510(d) was amended to state that “time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer.” *Id.*

<sup>3</sup> NASD Rule 2110 applies to Pino’s misconduct that occurred prior to December 15, 2008, and FINRA Rule 2010 applies to his misconduct that occurred on or after December 15, 2008. *See CapWest Sec., Inc.*, Exchange Act Release No. 71340, 2014 SEC LEXIS 205, at \*3 (Jan. 17, 2014) (stating that “[i]n September 2008, the Commission approved . . . FINRA Rule 2010 which replaced NASD Rule 2110 . . . [and that] [t]he new rule, which became effective December 15, 2008, does not alter, in any material respect, the prior rule”).

**1. Pino Exercised Discretion in ██████'s Accounts Without Written Authorization or Firm Approval**

The NAC properly found that Pino exercised discretion in ██████'s accounts at Centennial Securities and Money Concepts by executing trades without obtaining ██████'s prior approval. (RP 1297.) It is undisputed that Pino did not have written authority from ██████ to exercise discretion in either his Centennial Securities or Money Concepts accounts. (RP 258-59, 398.) It is also undisputed that neither Centennial Securities nor Money Concepts approved ██████'s accounts in writing for discretionary trading. (RP 398, 435, 453, 498.) Nevertheless, Pino made numerous purchases and sales in ██████'s accounts and the record shows that he did so without obtaining prior approval from ██████ on the day the trades were made.

██████ testified that, despite making more than 100 trades in his Centennial Securities account, Pino only spoke to him approximately once per month and that those discussions were not about the specifics of the trades, but about sports and general market conditions. (RP 244-45.) Similarly, at Money Concepts, Pino did not discuss with ██████ the quantity or purchase price for individual trades, and did not contact ██████ before selling stocks. (RP 257, 299.) ██████'s testimony about his communications with Pino was consistent with his statements to FINRA's examiner during the investigation.<sup>4</sup> (RP 356-59.) ██████'s testimony is clear that he did not know of and consent to the specific terms of numerous trades before Pino made them, including nearly all the trading at Centennial Securities and the sales at Money Concepts.

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<sup>4</sup> In her hearing testimony, FINRA's examiner testified that ██████ consistently maintained that Pino did not speak with him about specific trades at Centennial Securities, and did not contact him prior to selling stock at Money Concepts. (RP 356-59.)

While Pino contends that ██████'s testimony was inconsistent (Pino Br. at 1), the Hearing Panel credited ██████'s testimony with respect to his communications with Pino, and the NAC affirmed these credibility findings. (RP 1055, 1057, 1296-97.) It is "well settled that credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, 56 S.E.C. 76, 89 (2003); *see also Daniel Manoff*, 55 S.E.C. 1155, 1161-62 (2002) (deferring to hearing panel's credibility findings where the "record supports them and contains no substantial contrary evidence"). Pino has not overcome this burden.

Although Pino contends that he spoke with ██████ much more frequently at Centennial Securities, he also testified that he and ██████ often discussed sports. (RP 280.) With respect to their communications at Money Concepts, Pino's testimony largely corroborated ██████'s. Pino admitted that he often did not speak with ██████ prior to selling stocks in his account. (RP 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86.) Pino asserted, however, that during the conversation concerning the purchase he got what he viewed (incorrectly) as "time and price discretion" to sell the stock one or more days later if the stock reached a certain price range. (*Id.*) Pino also viewed ██████'s supposed agreement to pursue the earnings strategy as a form of time and price discretion. (*Id.*) As discussed below, Pino did not have proper time and price discretion.

Despite his own admissions and the overwhelming record evidence of his unauthorized discretionary trading in ██████'s account, Pino relies on a single facially ambiguous note made by a FINRA examiner as proof that he had oral approval from ██████ for all trades. (Pino Br. at 1.) The note, which Pino never introduced into evidence, indicates that Pino

contacted [REDACTED] before every trade after his move to Money Concepts. (RP 366.) It does not specify, however, when these conversations with [REDACTED] occurred, and Pino did not call the FINRA examiner who authored the note as a witness to explain it. In any event, even if the note were in evidence, which it is not, and were to be read in the light most favorable to Pino, the note (which says nothing at all about the trading at Centennial Securities) does not contradict the ample evidence, including Pino's own admissions, that he effected trades without getting prior approval from [REDACTED] on the day each trade was made. To the extent Pino argues that he obtained oral permission from [REDACTED] on the day prior to a trade or pursuant to the earnings strategy, such oral permission is insufficient to exercise discretionary power in a customer's account under Rule 2510. *See Murphy*, 2013 SEC LEXIS 1933, at \*27.

The record fully supports the NAC's findings that Pino exercised discretion in [REDACTED]'s accounts in violation of NASD Rule 2510. *See Murphy*, 2013 SEC LEXIS 1933, at \*27; *Sathianathan*, 2006 SEC LEXIS 2572, at \*34-35.

## 2. Pino Did Not Have Time and Price Discretion

Irrespective of the fact that Pino had no written authority to exercise trading discretion in [REDACTED]'s accounts, he now makes the generic argument that he violated no FINRA rules. (Pino Br. at 1.) Pino attempts to justify his trading in [REDACTED]'s accounts as falling within the "time and price discretion" exception to NASD Rule 2510. Pino asserted that [REDACTED] orally "pre-authorized" trades by: (1) agreeing to the sale at the time the purchase was discussed; and (2) based on his agreement to pursue the earnings strategy in his accounts. (RP 316, 319, 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86, 1196-97.) Pino misunderstands the limits of time and price discretion, and the NAC properly rejected these arguments. (RP 1299-1300.) The Commission should do the same.

While NASD Rule 2510(d)(1) does provide an exception to the general rule requiring written authority for discretionary trading, the exception is limited. The exception allows a registered representative to exercise discretion over the price at which or time when an order given by a customer shall be executed. This discretion, however, has two key limitations. First, the order must be for “a definite amount of a specified security.” Thus, the customer must have approved the specific security to be traded, as well as the specific quantity. *See Murphy*, 2013 SEC LEXIS 1933, at \*29 (stating that there was not a proper exercise of time and price discretion where the associated person exercised control over the type and quantity of the securities traded); *Sathianathan*, 2006 SEC LEXIS 2572, at \*35 (rejecting a claim of time and price discretion where the customer did not agree to the amounts to be purchased). Second, time and price discretion is only effective until the end of the business day in which the discretion was granted by the customer.

Pino’s admitted trading activity does not fall within the narrow parameters of time and price discretion allowed under NASD Rule 2510(d)(1), and provides him with no respite from the NAC’s findings of violations. First, the record shows that Pino did not limit his exercise of discretion to time and price; rather he also selected the security and the quantity to be traded without ██████’s prior approval. In other words, Pino created the order—the stock and number of shares—and executed it when he saw fit to do so. ██████ testified that while at Centennial Securities, Pino did not discuss particular stocks or transactions with him at all, and that he only learned of these transactions from after-the-fact conversations and firm-generated confirmations. (RP 244-46, 359.) While Pino did start contacting ██████ before purchases at Money Concepts, ██████ testified, and Pino admitted, that they did not speak prior to the sales. (RP 256-57, 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86.) And even when

purchases were discussed, [REDACTED] testified that the quantity of stock to be purchased was not discussed. (RP 299.) Pino's exercise of discretion over the particular stock and the quantity to be traded goes far beyond the definition of time and price discretion.

Second, even if [REDACTED] did grant Pino price or time discretion orally, which the evidence does not support, Pino's own testimony shows that he exceeded this purported authority because he did not exercise it on the same day he purportedly obtained it from [REDACTED]. Pino testified that with respect to 30-50% of the sales in [REDACTED]'s Money Concepts account, [REDACTED] gave him approval for the purchase and sale when he discussed the purchase with [REDACTED] and that the sale usually occurred on the day after the purchase. (RP 320-22, 375-76, 378-79, 389-90, 393, 397, 585-86, 1196-97.) Pino admitted that many times he would sell stock in the morning before [REDACTED] was available by telephone because he slept late. (RP 280-81, 585-86.) Other times, he would hold the stock he was purportedly authorized to sell when the stock did not meet Pino's price expectations immediately following the company's release of its earnings. (RP 394-95.) Indeed, Pino conceded that, on these occasions, he waited longer than one to three days to see if the stock would rise in price before selling it. (RP 399.) [REDACTED]'s account statements also show that there was not a single instance in which the purchase and sale of a stock occurred on the same day. (RP 609-1040.) Rather, Pino's purchases and sales for [REDACTED] usually spanned from one to three days while others spanned much longer periods. (*Id.*) Accordingly, Pino did not have time and price discretion under NASD Rule 2150(d)(1), which requires that the exercise of time and price discretion occur on the same business day it is received from the customer.

Tellingly, when a member of the NAC subcommittee explained during oral argument that the time or price discretion exception only applies to trades executed on the same business day

that the authority was given, and that otherwise authorization must be in writing, Pino conceded “[t]hen I’m guilty of the charge then. Then, there’s no need going further with this.” (RP 1197.)

The NAC also properly rejected Pino’s assertion that ██████’s agreement to trade in accordance with the earnings strategy gave him a sort of time and price discretion. Even assuming that ██████ approved the earnings strategy, the Commission has held that approval of a general trading strategy does not establish time or price discretion. *See Murphy*, 2013 SEC LEXIS 1933, at \*29 (stating that approval of a covered call strategy did not mean that trading would come within the time and price discretion exception); *Sathianathan*, 2006 SEC LEXIS 2572, at \*35 (finding that “general strategy discussions” that did not include specific orders for a definite amount of a particular security did not come within the time and price discretion exception).

The NAC correctly concluded that the trades Pino made for ██████’s accounts, even if based on general discussions of strategy, were discretionary trades by Pino, affected without written authorization in violation of NASD Rules 2510(b) and 2110 and FINRA Rule 2010. Accordingly, the Commission should affirm the NAC’s findings.

#### **B. The Proceedings Before FINRA Were Fair**

Pino advances a number of baseless challenges to the fairness of FINRA’s proceedings in an effort to blame FINRA for his own misconduct. First, he argues that Enforcement “coached” its customer witness, ██████, in the days before he gave his testimony. (Pino Br. at 1.) There is absolutely no support in the record for any untoward conduct by Enforcement. Enforcement’s preparation of its customer witness is a necessary, appropriate, and common component of trial preparation. *See Dep’t of Enforcement v. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at \*43-4 (FINRA NAC Dec. 28, 2011) (rejecting the claim that customer

witnesses were coached where witnesses met with enforcement attorneys and reviewed documents to aid in their recollection of events); *Dist. Bus. Conduct Comm. v. O'Brien*, Complaint No. C10920025, 1993 NASD Discip. LEXIS 247, at \*40 (NASD NBCC Aug. 20, 1993) (stating that it is necessary for an NASD attorney to confer with a complaining witness in order to prepare the evidence to be presented at the hearing).

There is nothing in the record that indicates anything other than the usual and appropriate preparation of a witness occurred here. [REDACTED] testified candidly and acknowledged when he did not remember or did not know something. (RP 270, 275.) His testimony at the hearing was consistent with his previous statements to FINRA examiners. (RP 356-69.) Furthermore, Pino was given ample opportunity to cross-examine [REDACTED], and he did so. (RP 266-304); see *Dan Adlai Druz*, 52 S.E.C. 416, 427 (1995) (rejecting a claim that witnesses had been coached where there was no supporting evidence in the record and the witnesses “were subject to examination and cross-examination”), *aff’d* 103 F.3d 112 (3d Cir. 1996) (Table). Significantly, the NAC affirmed the Hearing Panel’s finding that [REDACTED]’s testimony was credible. See *Dep’t of Enforcement v. Sathianathan*, Complaint No. C9B030076, 2006 NASD Discip. LEXIS 3, at \*51 (NASD NAC Feb. 21, 2006) (stating that de novo review by the NAC “further ensures that the proceedings are conducted fairly and without bias”), *aff’d* 2006 SEC LEXIS 2572 (Nov. 8, 2006).

Pino also makes other vague and undeveloped assertions about the fairness of the FINRA proceedings. He accuses the initial Enforcement attorney who filed the complaint of using “bullying tactics” and another Enforcement attorney of being “uninformed [about] the case,” but

does not explain the basis for these accusations or in what way these allegations affected the fairness of the proceedings.<sup>5</sup> (Pino Br. at 1; RP 1309.)

The record shows that Pino received a fair process in accordance with FINRA's Code of Procedure and the Exchange Act. Exchange Act § 15A(b)(8) requires FINRA to provide a fair procedure for disciplining its members and associated persons. Section 15A(h)(1) provides that a respondent must be given notice of the specific charges against him and an opportunity to defend himself, and that a record of the proceeding must be made for purposes of appellate review. See *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at \*48-9 (Nov. 9, 2012). Indeed, the record shows that Pino was served with a complaint that explained the causes against him in plain English, and that he was allowed ample opportunity to defend himself. (RP 6-10.) He was allowed to cross-examine all the witnesses and to testify and make arguments on his own behalf. (RP 217-414.) He was given the opportunity to present opening and closing arguments, and to challenge the admissibility of evidence at the hearing. (RP 227-29, 249-50, 317-18, 411-13.); see *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at \*23 (Dec. 22, 2008) (finding that respondent had been provided with a fair proceeding where he "had the opportunity to present evidence and arguments in his favor,

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<sup>5</sup> Pino also asserts that [REDACTED]'s initial complaint was prompted by the advice he received from a registered representative at a different firm with whom [REDACTED] began to work after Pino. (Pino Br. at 1.) While [REDACTED] testified that he indeed sought the assistance of his new advisor in making his initial complaint to Pino's firm, the origin of FINRA's investigation into Pino's misconduct is irrelevant to whether Pino violated FINRA's rules. (RP 287-88.) Moreover, it is well settled that FINRA's enforcement jurisdiction is independent of any customer complaint. See *Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000) (holding that FINRA's "power to enforce its rules is independent" of a customer's decision to complain), *aff'd*, 47 F. App'x 198 (3d Cir. 2000). The important issue here is that the record, including [REDACTED]'s testimony, which was credited by the Hearing Panel and the NAC, and Pino's own admitted trading activity, fully supports the NAC's findings.

to testify, and to cross-examine witnesses”). Pino’s complaints about FINRA’s proceedings have no merit.

Pino also suggests that FINRA’s proceedings were not fair because he was not represented by counsel. Pino’s decision to represent himself is not a basis for challenging the fairness of FINRA’s proceedings. While FINRA rules allow the participation of counsel, the Commission has repeatedly held that there is no right to have counsel provided for free to a respondent in proceedings before FINRA. *See Tucker*, 2012 SEC LEXIS 3496, at \*49; *Craig*, 2008 SEC LEXIS 2844, at \*23 (stating that “there is no right to counsel in [FINRA] disciplinary proceedings”).

Pino also objects to what he calls “assertions” that it was “immoral to promise [the] client he would try harder to recoup monies lost.” (Pino Br. at 1.) Pino appears to be referencing the admission of a letter he sent to ██████████ “pledg[ing] to restore and grow” ██████████’s account. (RP 1043.) The record shows that this communication between Pino and ██████████ was properly admitted. The NAC, however, did not make any findings with respect to this letter, and it is completely irrelevant to Pino’s discretionary trading violations.<sup>6</sup>

FINRA’s proceedings followed the standards for fairness in the Exchange Act. Pino’s arguments provide no reason to overturn the NAC’s decision.

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<sup>6</sup> In any event, the NAC’s de novo review of the record further ensures that the proceedings here were conducted fairly and without bias. *See, e.g., Tucker*, 2012 SEC LEXIS 3496, at \*53 (noting that de novo review by the NAC “dissipates any harm that may have resulted from any improper procedural decisions made at the hearing level”); *Sathianathan*, 2006 NASD Discip. LEXIS 3, at \*51 (same).

**C. The Sanctions Imposed by the NAC Are Appropriately Remedial and Are Neither Excessive Nor Oppressive**

For Pino's exercising discretion without written authority, the NAC fined Pino \$5,000 and suspended him in all capacities for 30 business days. These sanctions are appropriately remedial, are supported by FINRA's Guidelines and should be sustained.

The Commission uses the Guidelines "as a benchmark in conducting [its] review." *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at \*79 n.85 (May 27, 2011), *aff'd* 693 F.3d 251 (1st Cir. 2012). For exercising discretion without a customer's written authority, the Guidelines recommend a fine between \$2,500 and \$10,000 and, in egregious cases, a suspension of 10 to 30 business days.<sup>7</sup> Considering the numerous applicable aggravating factors, the NAC correctly determined that Pino's violations were egregious.

In assessing sanctions for exercising discretion without written authority, the principal considerations set forth in the Guidelines are "[w]hether [the] customer's grant of discretion was express or implied," and whether the member firm's policies prohibited discretionary trading. *See Guidelines*, at 85 (Principal Considerations Nos. 1 & 2). Both these considerations are aggravating here.

The NAC properly found that Pino had neither express nor implied consent to exercise discretion in [REDACTED]'s account. (RP 1301.) [REDACTED] testified that he never had a discussion with Pino in which he told Pino to trade on his behalf. (RP 259.) Indeed, [REDACTED]'s testimony revealed an unsophisticated investor who did not even understand that he was supposed to approve all trading in his non-discretionary accounts. For example, [REDACTED] testified that,

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<sup>7</sup> *FINRA Sanction Guidelines* 85 (2013), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

while he was concerned about the Money Concepts account, he “didn’t know how to stop the trading and freeze the account.” (RP 261.) In addition, when asked why he had not complained to Centennial Securities, ██████ testified that he “didn’t know [he] was . . . within [his] rights to call Centennial [Securities] and tell them I wasn’t making trades or picking the stocks.”<sup>8</sup> (RP 247.) Under these circumstances, ██████ cannot be said to have given Pino any authorization—express or implied—to exercise discretion in his account. This lack of authority is a significant aggravating factor. *Guidelines*, at 85 (Principal Considerations No. 1).

An additional aggravating factor is that neither the Centennial Securities account nor the Money Concepts account was approved for discretionary trading by the respective firms. (RP 398, 435, 453, 498.) The record shows that Centennial Securities’ policies and procedures prohibited discretionary trading in all accounts other than certain approved fee-based accounts—which ██████ did not have. (RP 347, 437.) Money Concepts’ policies were even more restrictive and prohibited discretionary trading by general securities representatives like Pino altogether. (RP 311-12.) Pino acknowledged that he was aware of his firms’ policies concerning discretionary trading.<sup>9</sup> (RP 324-27.) As the NAC rightly found, Pino’s discretionary trading in

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<sup>8</sup> Pino objects to the characterization of ██████ as an unsophisticated investor, but gives no reasons for finding otherwise. (Pino Br. at 1.) The facts are that ██████ was a high school graduate with no investment experience other than his small IRA which was provided as a benefit of his employment, and whose testimony showed little understanding of his sole authority to approve the trading in his accounts. (RP 234-37, 247, 261.)

<sup>9</sup> Pino flatly denies violating his firms’ compliance policies and accuses the NAC of ignoring statements from his firm’s representative that no policies were violated. (Pino Br. p. 1.) Pino appears to be referring to Centennial Securities’ written response to FINRA’s Rule 8210 request in which a Centennial Securities representative stated that “[c]ertainly Mr. Pino was not authorized to exercise discretion in Mr. ██████’s account, and *from my talks with Mr. Pino* I do not think that he did.” (RP 454; emphasis added.) Pino’s argument here is unavailing. The record convincingly shows that Pino *did exercise* discretion in ██████’s accounts, and this statement, which was based on Pino’s misrepresentations to his firm, cannot change the facts.

[Footnote continued on next page]

violation of these policies is particularly troubling because it meant that the accounts were not given the additional supervision that a firm would normally give an approved discretionary account. (RP 1301.) Accordingly, the fact that Pino engaged in discretionary trading in [REDACTED]'s account in violation of these firm policies is further aggravating here. *Guidelines*, at 85 (Principal Considerations No. 2).

Finally, the NAC also found it aggravating that Pino's misconduct was intentional and occurred over a period of approximately two years. (RP 1301.) While the NAC did not make specific findings concerning the number of unauthorized trades in [REDACTED]'s account, Pino testified that he applied the earnings strategy, pursuant to which he would sell the stock at his discretion, in [REDACTED]'s accounts starting in March 2007 and continuing for a two-year period. (RP 387, 616.) He further testified that 30-50% of the sales in [REDACTED]'s Money Concepts account were at his discretion pursuant to the earnings strategy. (RP 321.) Moreover, [REDACTED] testified that numerous trades occurred in his accounts at both Centennial Securities and Money Concepts without his prior approval. (RP 244-46, 257.)

In an effort to excuse his misconduct, Pino appears to rely upon two purportedly mitigating factors. First, he cites his "exemplary" 25-year record as a registered representative. (Pino Br. at 1.) It is well settled, however, that a lack of disciplinary history is not mitigating. *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at \*65 n.77 (Nov. 12, 2010), *aff'd* 449 F. App'x 886 (11th Cir. 2011); *see also Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at \*23 (Nov. 8, 2006) (stating that the absence

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[cont'd]

Indeed, this statement does little to help Pino as it confirms unequivocally that his discretionary trading in [REDACTED]'s account was not authorized by Centennial Securities.

of disciplinary history is not mitigating because “an associated person should not be rewarded for acting in accordance with his duties as a securities professional”).

Second, Pino cites the lack of customer harm as mitigating here, and argues that the NAC mistakenly found that the trading caused losses. (Pino Br. at 1.) Pino claims that the losses in [REDACTED]’s account were caused by the general market downturn and not from the trading in the account pursuant to the earnings strategy. (Pino Br. at 2.) Pino is wrong on both counts. The NAC expressly declined to find that [REDACTED]’s losses were an aggravating factor because there was insufficient evidence showing the extent to which Pino’s discretionary trading caused the losses. (RP 1301.) Moreover, the law is clear that, even if the unauthorized trading did not result in customer losses, the lack of customer harm is not mitigating. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at \*26 n.24 (Feb. 24, 2012) (stating that the absence of customer harm is not mitigating); *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996) (imposing a bar because, even though conduct did not involve direct harm to customers, “it flouts the ethical standards to which members of this industry must adhere”).

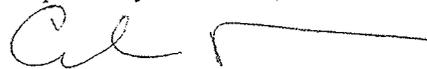
The Guidelines and the applicable aggravating factors fully support the NAC’s sanctions. Pino’s misconduct was egregious, and the fine and suspension imposed are appropriately remedial given the seriousness of Pino’s misconduct. Accordingly, the Commission should affirm the sanctions.

**V. CONCLUSION**

Pino exercised discretion in [REDACTED]’s accounts without the required written authorization or firm approval. Moreover, the record evidence, including Pino’s own description of the trading in the account, establishes that the time and price discretion exception is inapplicable. Taking into account the facts and circumstances of this case, and the applicable

aggravating factors, the sanctions are entirely appropriate for Pino's misconduct. Accordingly, the Commission should affirm the NAC's decision in all respects.

Respectfully submitted,



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